constantly arise in the management of the public domain. Nor does the failure of Congress to ratify the President's act when requested to do so negative the existence of the power in the present instance, in view of the words of the statute passed that it should not be construed as a "recognition, abridgment, or enlargement" of such rights.[12] Furthermore, it is submitted that the question of ratification is immaterial. It could not have related back to the prejudice of intervening rights acquired by settlers between the order and the ratification.[13]

It is clear that the case should not be interpreted as conferring any additional power on the Executive. It is merely a judicial recognition of the fact that Congress is as likely as any other property owner, busy with affairs, to employ a general administrative agent whose authority is implied from the principal's acquiescence.

ENJOINING WASTE TO PROTECT INCHOATE DOWER. — There is a long standing diversity of opinion in the books concerning the nature of the somewhat impalpable right of the wife known as inchoate dower. It has sometimes been maintained that she has a subsisting interest or estate in land,[1] while on the other hand it is also postulated that the wife had in no sense an interest, but merely an inchoate right of action.[2] A recent New York case makes pertinent the question whether this jejune inquiry is of any practical importance. *Rumsey* v. *Sullivan*, 150 N. Y. Supp. 287 (App. Div.). In a suit by the wife to protect her inchoate dower, the court refused to enjoin waste by the grantee of the husband who took by a conveyance in which the wife did not join, and who was exploiting the land for oil by opening new wells and using wells he had already opened.[3] The only other case that has been found upon the subject is one in South Carolina, which granted an injunction where the husband's assignee was clearing the land of timber.[4]

It is certain that regardless of the view taken as to the nature of inchoate dower, the courts have given it substantial protection in many instances. A wide variety of remedies have been made available to the wife when an alienation has been fraudulently secured by the husband without her consent, or when her consent has been obtained by fraud.[5] Whenever outsiders are to acquire a new interest in the realty, either by act of the parties or by operation of law, the wife's interest is recognized

[12] ACT OF JUNE 25, 1910; 36 STAT. 847.

[13] Taylor *v.* Robinson, 14 Cal. 396; see Cook *v.* Tullis, 18 Wall. (U. S.) 332, 338.

[1] See Simar *v.* Canaday, 53 N. Y. 298, 304; 2 SCRIBNER, DOWER, 6 *et seq.*; 20 HARV. L. REV. 407.

[2] See Moore *v.* City of New York, 8 N. Y. 110, 113; 4 COUNSELLOR, 199, 200; TIFFANY, REAL PROPERTY, § 197.

[3] For a statement of the case, see RECENT CASES, p. 630.

[4] Brown *v.* Brown, 94 S. C. 492, 78 S. E. 447.

[5] Further transfer may be enjoined. Brown *v.* Brown, 82 N. J. Eq. 40, 88 Atl. 186. A judgment may be opened so that she can intervene. Waterhouse *v.* Waterhouse, 206 Pa. St. 433, 55 Atl. 1067. If execution sale brings only a nominal sum, a constructive trust will be imposed on the assignee. Buzick *v.* Buzick, 44 Ia. 259. A deed in which she was led to join by fraud may be cancelled of record. Clifford *v.* Kampfe, 147 N. Y. 383. Or she may have damages at law for misrepresentation. Simar *v.* Canaday, *supra*.

as having present value, and if necessary, steps are taken to preserve this to her.[6] An impressive list of the kinds of protection given might be compiled,[7] and no doubt each instance might be adequately explained either on the ground that she has an interest in realty or that social necessity requires a preservation of her rights, of whatever nature they may be.[8] Nor does the fact that the wife may not assign her dower [9] tend materially to show that it is not an estate, for the contingent remainder, long recognized as an estate, was not assignable at common law.[10] At the most, the names fastened upon inchoate dower are merely indications of the temper of the particular court and the extent to which it might afford protection.

The enjoining of waste, likewise, does not call for a determination of this mooted question. Equity, of course, looks at the substance and disregards the formal attempts at meticulous cataloguing made by the law courts. Thus waste may be enjoined by a life tenant,[11] or by a remainderman when preceded by an intervening estate,[12] although no remedy exists for such estates at law. If in substance it appears that the holder of the land is using it to an extent beyond what can properly be presumed to have been given him,[13] equity stops the abuse. The wife, whatever she has now, will, on the arising of a contingency, have an estate in the land. Her interest is substantially like a life estate in one-third of the realty, splitting the husband's estate in fee, as it were, into a precedent life estate and a subsequent remainder in fee,[14] or even more similar to an executory devise for life on the happening of a contingency.[15] As these estates are protected from waste,[16] equity should likewise see to it that the value of inchoate dower, whatever its legal status, should not be destroyed. It is true that the husband himself is unimpeachable for

---

[6] Release of inchoate dower is valid consideration. Bullard *v.* Briggs, 24 Mass. 533. Redemption at tax sale may be based upon it. Henze *v.* Mitchell, 93 Neb. 278, 140 N. W. 149. It will constitute breach of a covenant against incumbrances. Russ *v.* Perry, 49 N. H. 547. In partition it cannot be cut off unless the wife is made a party. Greiner *v.* Klein, 28 Mich. 12. In condemnation proceedings and in mortgage foreclosure a share of the proceeds must be set aside for the wife. *In re* New York and Brooklyn Bridge, 75 Hun 558, 27 N. Y. Supp. 597. Vreeland *v.* Jacobus, 19 N. J. Eq. 231. *Contra,* Kauffman *v.* Peacock, 115 Ill. 212. Adverse possession for the statutory period in the lifetime of the husband will not prejudice the interest of the widow at his death. Lucas *v.* Whitacre, 121 Ia. 251, 96 N. W. 776; Winters *v.* De Turk, 133 Pa. St. 359, 19 Atl. 354.

[7] *E. g.*, see TIFFANY, REAL PROPERTY, § 197; 20 HARV. L. REV. 407.

[8] For a discussion of the strong public policy which led to the establishment of dower and the high protection which the courts have therefore given it, see 1 SCRIBNER, DOWER, 20.

[9] See Johnston *v.* Vandyke, 13 Fed. Cas., No. 7,426, p. 894; Mason *v.* Mason, 140 Mass. 63.

[10] See 28 HARV. L. REV. 191.

[11] Molineaux *v.* Powell, 3 P. Wms. 268 n. (F.).

[12] Anonymous, Moore, 554, pl. 748; Perrot *v.* Perrot, 3 Atk. 94.

[13] For an excellent discussion of the grounds on which equity enjoins waste, see Lord Campbell's opinion in Turner *v.* Wright, 2 DeG. F. & J. 234.

[14] *Cf.* statements in the cases such as in Mason *v.* Mason, *supra*, p. 63, " . . . the inchoate right of dower is a vested right of value dependent on the contingency of survivorship. . . ."

[15] *Cf.* Bullard *v.* Briggs, *supra*, p. 539, "It [dower] is more than a possibility and may well be denominated a contingent interest."

[16] Life estate: see note 12 *supra;* executory devise: Turner *v.* Wright, *supra.*

waste.[17] But this is due no doubt to the wife's incapacity at common law to sue her husband, and now even after statutory emancipation this long-established privilege of the husband would probably continue on grounds of policy. But the grantee of the husband would not be protected by any such procedural bar or by considerations of domestic welfare.

Although in the principal case the court expressed itself strongly against enjoining waste, the case was fortified by the fact that the grantee was merely committing ameliorating waste.[18] In the case of a life estate or executory devise the courts will enjoin only equitable waste,[19] that is, a use beyond what a prudent manager would do with his own property. As the wife's interest is certainly no more substantial than these estates, the principal case may be supported because of the absence of equitable waste. However, as dower differs from other cases in that it arises by action of law rather than the intent of the parties, it may be that the policy of the law which creates it would favor protection from legal waste as well. Whatever may be the final result, the two cases that have arisen certainly would not go to this extent.[20]

THE TAXING POWER AND THE JURISDICTION OF THE COURTS. — That judicial tribunals in the absence of statute are without jurisdiction themselves to exercise the taxing power has again been demonstrated in a case lately certified to the United States Supreme Court. *Yost* v. *Dallas County*, 35 Sup. Ct. 235.[1] The holder of county bonds, entitled to have a tax assessed, levied, and collected on his behalf, had recovered an uncollectible judgment,[2] but, although none but ministerial acts were required to raise the tax,[3] enforcement by the statutory remedy "by man-

[17] This is stated in TIFFANY, REAL PROPERTY, § 197, and extended also to "other persons." None of the cases cited, however, are in point.

[18] No wells had been sunk at the time the husband conveyed to the defendant. The dower tenant is entitled to operate only the mines or wells that were opened in the husband's lifetime. Stoughton *v.* Leigh, 1 Taunt. 402; Coates *v.* Cheever, 1 Cow. 460. The defendant, therefore, by opening wells was doing that which alone gave the wife any valuable interest in the deposits. Nor did it appear that the wells which the defendant had already opened were being used in any but a normal way.

[19] See cases in notes 12 and 16 *supra*.

[20] The South Carolina case, *supra*, note 4, seems to limit its decision to cases of equitable waste. Furthermore, instead of enjoining waste as to one third of the estate, it permitted waste up to the present value of inchoate dower as figured on expectancy tables by the rule suggested in Jackson *v.* Edwards, 7 Paige (N. Y.) 386, 408. As this value would be less, — probably much less, — than one third of the estate, this anomalous further limitation on the wife's rights seems indefensible.

[1] The case is stated with greater detail in this issue of the REVIEW, p. 640. The opinion of the court was delivered by Holmes, J. McKenna, J., and Pitney, J., dissented.

[2] This was the proper procedure. The validity and extent of the claim should be determined by judgment, and such judgment must be found incapable of satisfaction, before attempting the remedy by mandamus. See Von Hoffman *v.* City of Quincy, 4 Wall. (U. S.) 535; City of Galena *v.* Amy, 5 Wall. (U. S.). 705; Riggs *v.* Johnson County, 6 Wall. (U. S.) 166, 193; Walkley *v.* City of Muscatine, 6 Wall. (U. S.) 481.

[3] As to what is a ministerial act, see TAPPING, MANDAMUS, 171 *et seq.*; 4 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 1489. Kimberlin *v.* Commission to Five Civilized Tribes, 104 Fed. 653; Riverside City *v.* San Bernardino County, 134 Cal. 517, 66 Pac. 788; Rice, etc., Co. *v.* Worcester, 130 Mass. 575; Hull *v.* Oneida County, 19 Johns. (N. Y.) 259; Friel *v.* McAdoo, 181 N. Y. 558.